

January 27, 2006

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: EX PARTE SUBMISSION

ET Docket No. 05-247; In the Matter of Continental Airlines, Inc. Petition for Declaratory Ruling Regarding Whether Certain Restrictions on Antenna Installation Are Permissible Under the Commission's Over-the-Air Reception Devices (OTARD) Rules

Dear Ms. Dortch:

On January 27, 2006, Donna Katos, Robert Edwards and John W. Stelly of Continental Airlines, Inc. ("Continental"), Henry M. Rivera and the undersigned, both of Vinson & Elkins LLP and counsel to Continental Airlines, met with Fred Campbell, Legal Advisor to Chairman Kevin Martin. At this meeting, we discussed Continental's petition seeking a determination that the restrictions imposed by the Massachusetts Port Authority on the installation, maintenance and use of Continental's Wi-Fi antenna at Boston's Logan Airport are prohibited by the Commission's Over-the-Air Reception Devices rules. In addition, we provided Mr. Campbell with a copy of Continental's written *ex parte* submission filed with the Commission on January 13, 2005, and which is part of the record in this proceeding.

A copy of the presentation distributed at the meeting, which contains the issues discussed, is attached to this letter. Pursuant to Sections 1.49(f) and 1.1206(b) of the Commission's rules, this letter and its attachment have been filed electronically.

Respectfully submitted,

/s/ Edgar Class

Edgar Class

Counsel to Continental Airlines, Inc.

Attachment

cc: Fred Campbell
Bruce Franca
Julius Knapp
Bruce Romano
Lauren Van Wazer
Alan Scrim
Jamison Prime
Gary Thayer
Nicholas Oros
Catherine Seidel
Joel Taubenblatt
Sam Feder

Use of Unlicensed Spectrum at Airports

**Presentation to Fred Campbell
Legal Advisor to Chairman Kevin Martin**

Continental Airlines

**January 27, 2006
Washington, D.C.**

Who we are

V&E

- Robert Edwards
 - Continental's Staff Vice President of IT Operations, Technology Department
- John W. Stelly
 - Continental's Managing Director, Technology Department
- Donna Katos
 - Continental's Managing Attorney – Litigation

Background

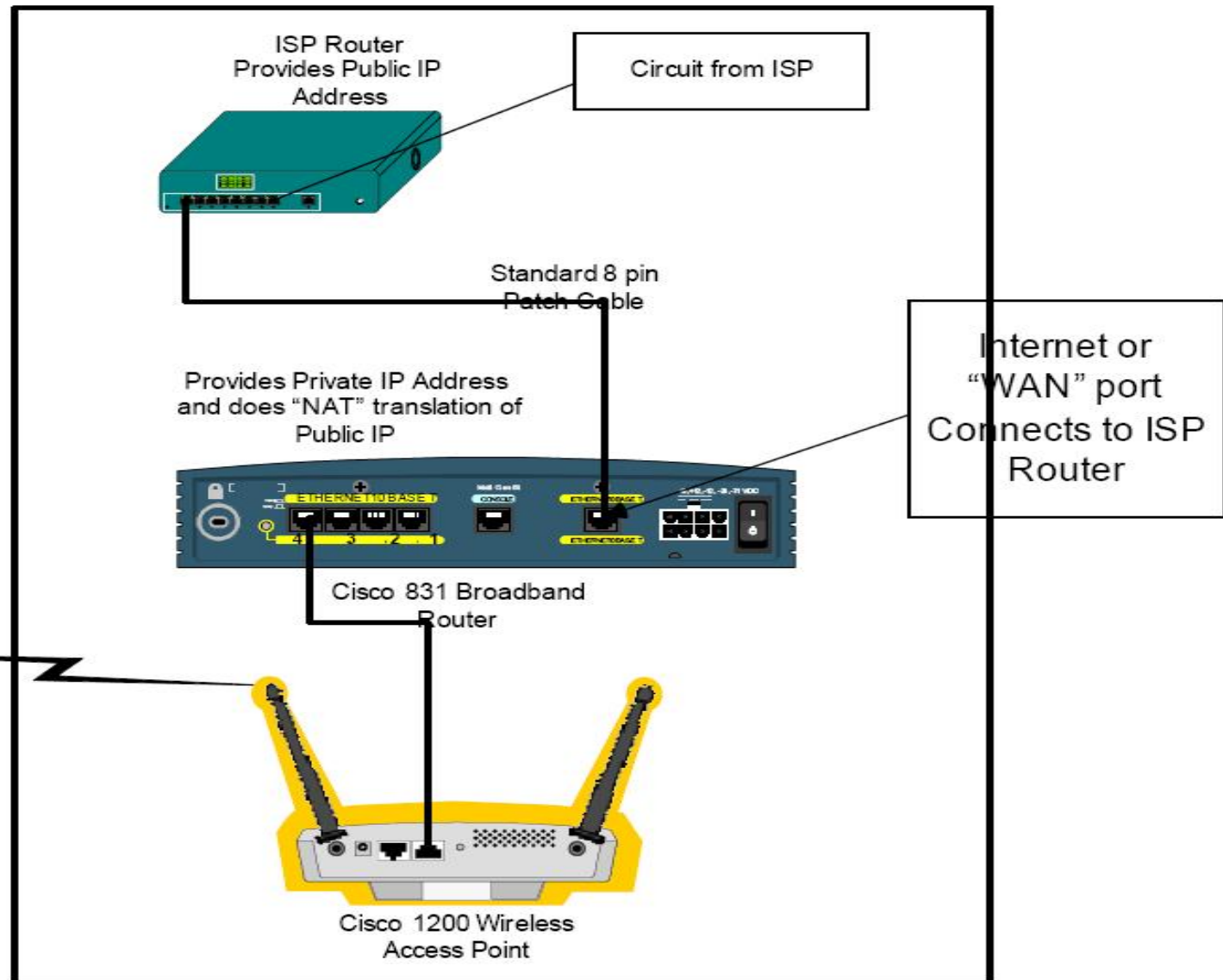
- Installation of fixed wireless antenna
 - In July 2004, Continental installed a fixed wireless antenna to create a Wi-Fi hotspot for Internet access within the premises of its Presidents Club at Logan Airport
 - Antenna enables anyone with an 802.11b Wi-Fi enabled computer to access the Internet from anywhere in the club
- Antenna users
 - Continental employees
 - Wireless access to corporate network
 - Passengers in the Club premises
 - Wireless access to the Internet at no charge



Background (cont'd)

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- Instant connection (no log-on screen, user ID, or password required)
- No charges or fees



Background (cont'd)

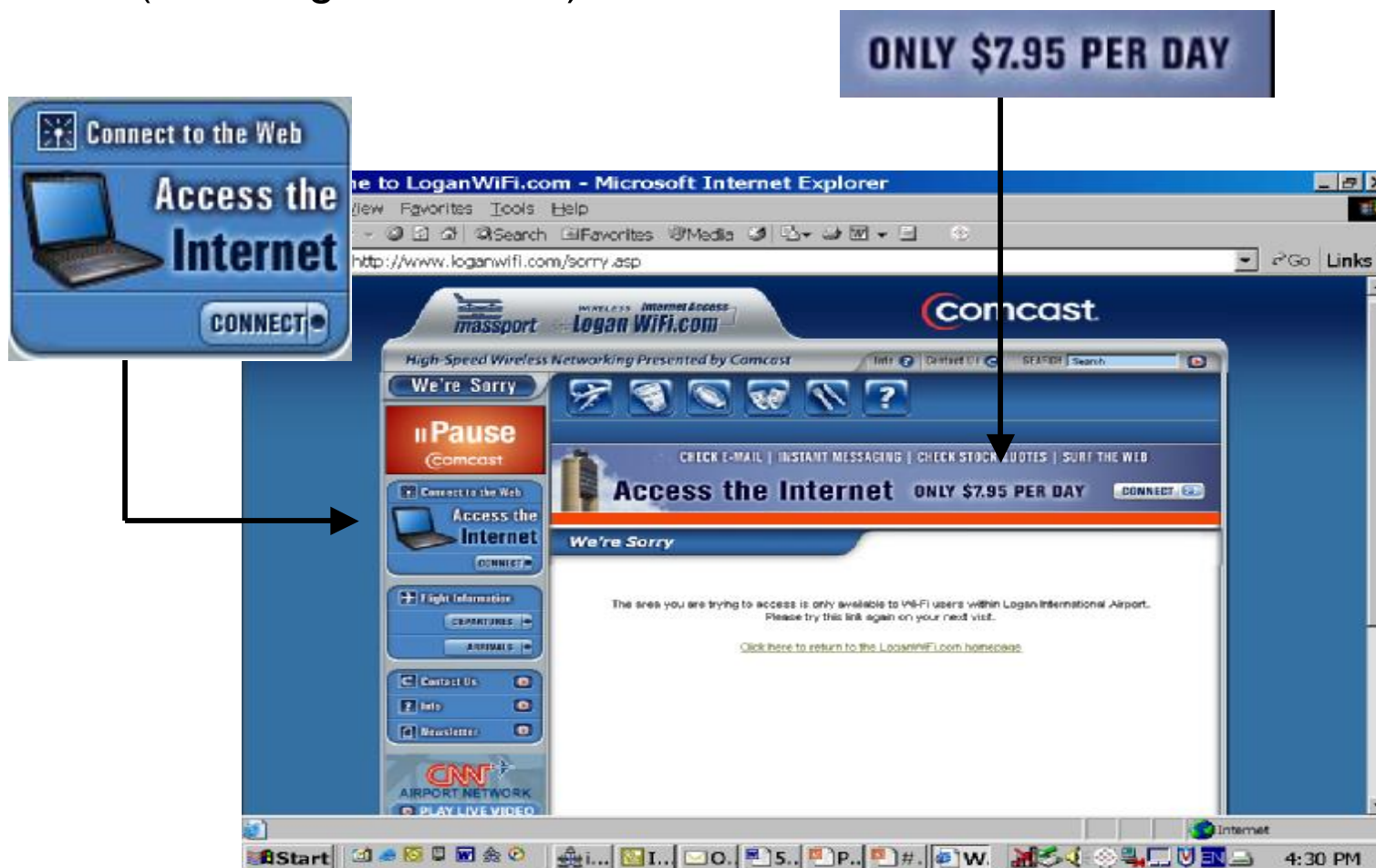
- Demands by the Massachusetts Port Authority (“Massport”)
 - On June 10, 2005, Massport demanded that Continental remove its Wi-Fi antenna from the Club premises
 - Massport stated that the installation and operation of the antenna was a violation of the lease agreement between the parties
 - On June 10, 2005, Massport also demanded that American Airlines remove its wired system and that Delta Airlines remove its Wi-Fi antenna from their respective frequent flyer lounges
 - Previously, Massport demanded that American remove its Wi-Fi antenna from its premises. American reluctantly agreed, and replaced it with an expanded wired system, which Massport also demanded be removed

Background (cont'd)

- AWG Exclusive Contract
 - Massport's demands coincided with the grant of an exclusive contract to AWG for the installation, operation and maintenance of a central antenna for the provision of Wi-Fi service throughout Logan
 - Massport's position is that everyone at Logan must use the AWG-installed antenna
 - Consumer options to access the Internet via the AWG system:
 - Pay \$7.95 per day per user, OR
 - Become a customer of iPass or Boingo (these companies have entered into agreements with AWG) or one of their partners, OR
 - Airport tenants (such as Continental) buy the service from AWG to allow their employees and customers to access the Internet
 - Massport and AWG receive a portion of the revenues from wireless Internet access service, regardless of how a user gains access to the Internet

Background (cont'd)

- Requires log-on ID, password and \$7.95 per day per user (www.loganwifi.com)



The OTARD rules

- On June 23, 2005, Continental informed Massport that its restriction on the use of the Wi-Fi antenna was in violation of the OTARD rules
- The OTARD rules prohibit restrictions that impair the installation, maintenance or use of antennas used to receive and transmit fixed wireless signals
- Purpose of the OTARD rules is to:
 - Ensure that consumers have access to a broad range of services
 - Foster full and fair competition among different types of services and service providers
- There are three exceptions to the rules:
 - Safety exception
 - Central antenna exception
 - Restrictions necessary for historic preservation (not an issue here)

Continental's Petition for Declaratory Ruling

- Massport did not relent and on July 7, 2005, Continental filed a Petition asking the FCC to declare that Massport's demand for removal of the antenna is prohibited and preempted by the OTARD rules
- The FCC placed the Petition on public notice
 - Approximately 2,000 frequent flyers filed comments in support of the Petition
 - Supporting comments or *ex parte* filings were also filed by:

The Air Transport Association Enterprise Wireless Alliance T-Mobile American Airlines Personal Communications Industry Association Consumer Electronics Association	Alliance for Public Technology CTIA – The Wireless Association 10 state PUC regulators Champaign-Urbana Community Wireless Network, New America Foundation, and Free Press
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Issue before the FCC

- Are Massport's restrictions on the installation, maintenance and use of a fixed wireless antenna by Continental in its frequent flyer lounge in violation of the FCC's rules?
 - The answer is Yes
 - Massport imposed a restriction that impairs the installation, maintenance or use of Continental's antenna
 - The antenna is located on property within Continental's exclusive control or use
 - The antenna is used to transmit fixed wireless signals defined by the FCC to include Wi-Fi access points
 - The antenna is one meter or less in diameter

The safety exception does not apply

- Massport has failed to provide any basis to conclude that its restrictions are necessary to accomplish a “clearly defined, legitimate safety objective”
- Use of Massport’s commercial Wi-Fi system by public safety entities would not automatically trigger the safety exception
 - The safety exception is not a public safety exception that can be invoked by asserting that public safety entities will use the airport’s commercial Wi-Fi system
 - The safety exception was meant to allow restrictions directly related to the physical safety of citizens (e.g., fire codes preventing installation of antennas on fire escapes)
 - There is no evidence in the record that any public safety agency is now using Massport’s commercial Wi-Fi system

The restriction ignores FCC's Part 15 spectrum management approach

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- Massport says the public interest requires it to manage and prioritize spectrum resources at Logan, but:
 - Congress has delegated this function to the FCC
 - Under Part 15, unlicensed frequencies are shared and subject to open access and Massport cannot prioritize their use
 - Unlicensed Part 15 devices may not cause harmful interference to and must accept any interference from authorized radio users
 - FCC has provided licensed spectrum for mission-critical public safety communications
 - The Commission recently clarified that no user, even a public safety user, has priority rights in unlicensed spectrum (Order, FCC 05-194, Nov. 18, 2005)

The central antenna exception does not apply

- The central antenna exception does not apply because:
 - Continental's ability to select its provider of choice is impaired by Massport's restriction
 - Options limited to AWG, iPass, Boingo, or their affiliated partners
 - The costs associated with the use of Massport's airport-wide commercial Wi-Fi system are greater than the costs of installation, maintenance and use of the individual antenna

The FCC has the authority to provide the relief requested

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- Massport argues that the FCC lacks the statutory authority to extend the OTARD rules to fixed wireless signals. However:
 - In 2004, the FCC considered and rejected identical arguments that it acted outside the scope of its authority in extending OTARD to fixed wireless services (Order on Recon., WT Docket 99-217 ¶ 8)
 - Furthermore, the FCC has unequivocally stated that the right to install and operate customer antennas applies to unlicensed equipment such as Wi-Fi access points (June 24, 2004 Public Notice)

Continental's antenna is a customer-end antenna under the OTARD rules

- Massport argues that Continental has no right to install and use the antenna because the OTARD protections apply only to “customer-end” antennas. However:
 - The FCC has specifically stated that the protections of the OTARD rules apply to customer-end antennas that have “the additional functionality of routing service to additional users”
 - Continental's antenna is used by employees, customers, and other visitors to its lounge and Massport points to nothing in the rules that suggests that such use of an antenna precludes the antenna from the protections afforded by the OTARD rules

The FCC has preemptive authority

- Massport argues that without express or implied Congressional action, the FCC lacks preemptive authority over state or local governments acting in their proprietary capacity
 - This ignores that the FCC adopted the OTARD rules in response to a direct Congressional mandate in section 207
 - This also ignores the FCC's findings that pursuant to section 303, the Commission has always possessed authority to promulgate rules addressing OTARD devices
- The OTARD rules were written to be sensitive to federal federal preemption concerns
 - The rules do not preempt all regulation of fixed wireless devices, only those regulations that unreasonably impair their use or installation
 - The rules contain the safety and historic preservation exceptions to protect legitimate concerns of state and local government

The OTARD rules do not effect a taking

- The FCC has twice rejected takings challenges to the OTARD rules
- There is no *per se* taking because the OTARD rules apply only where there is consent to the occupation of the property
- There is no regulatory taking because Massport has failed to bring a suit for compensation, which is a prerequisite for such a claim
 - Massport argues that because every Wi-Fi antenna must have a wireline connection, typically at T-1 line through common areas, an expansion of OTARD to these antennas constitutes a taking
 - But Continental's Petition does not seek a ruling that OTARD requires Massport to provide Continental with access to a wireline connection
 - Also, unreasonable prohibition on use of facilities to connect Continental's Wi-Fi traffic to the public network would be an impermissible restriction in violation of the Communications Act.

Massport's restriction is contrary to FCC rules and policies, congressional mandate and the administration's agenda

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- Purpose of OTARD rules
 - Ensure that consumers have access to a broad range of services
 - Foster full and fair competition among different types of services and service providers
- FCC Internet Policy Statement
 - Consumers are entitled to competition among network providers, applications, service and content providers
- Section 706 Mandate
 - Encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans
- Administration's Technology Agenda
 - "We ought to have...universal, affordable access for broadband technology by the year 2007" (President Bush, March 26, 2004)

Policy implications

- Allowing Massport's restrictions to stand would:
 - **Deprive Continental and its customers of a choice among competing Internet service providers.** (*"Massport's actions ... would result in a monopolized wireless broadband market ... and could set a dangerous precedent of encouraging other regulatory authorities across the country to seek to limit competition."* State PUC Commissioners Ex Parte, 1/23/06)
 - **Open the door to future efforts by airports and other landlords to restrict use of unlicensed wireless services.** (*"If allowed to stand, Massport's restrictions would create a dangerous precedent suggesting that landlords – and not the Commission – possess the authority to manage critical spectrum resources."* CTIA Ex Parte, 1/4/06)
 - **Frustrate the FCC's policies to ensure the open and interconnected nature of the public Internet.** (*"The fourth policy principle ensures that consumers have choice among network providers, application and service providers, and content providers. CEA urges the Commission to apply this principle to the facts in this proceeding."* CEA Reply Comments, 10/13/05)

Policy implications (cont'd)

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- **Place the economic interests of landlords such as Massport above the policies favoring expansion of the use of unlicensed wireless devices and networks for the benefit of all Americans** (*“Because many community wireless networks serve individuals and organizations in leased premises, and cannot hope to pay landlords for access, failure to include Part 15 devices under the protection of the OTARD rules would fall hardest on already underserved communities.”* CUWN, New America Foundation, Free Press Ex Parte, 1/23/06)
- **Threaten innovation and consumer choice in the Wi-Fi market** (*“Wi-Fi use is spreading rapidly and, in the very near future, Wi-Fi access points will be nearly ubiquitous ... and the agency should continue to manage this spectrum to promote expansion and innovation.”* T-Mobile Ex Parte, 1/9/06)